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No. 84-1111

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LEONARD SUSSMAN,

Petitioner,

v.

THE NEWS-JOURNAL CORPORATION,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

DAVID A. MONACO
COBB & COLE, P.A.
150 Magnolia Avenue
Post Office Box 191
Daytona Beach, Florida 32015
Phone 904/255-8171
Attorney for Respondent

QUESTIONS PRESENTED

The questions presented for review contained in the Petition for Writ of Certiorari are accepted.

PARTIES TO PROCEEDING

All parties to this proceeding are contained in the caption.

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REFERENCE TO OPINIONS

The references to the official and unofficial opinions in the courts below contained in Paragraph 4 of the Petition for Writ of Certiorari are accepted.

STATEMENT OF JURISDICTION

The jurisdictional reference contained in Paragraph 5 of the Petition for Writ of Certiorari to 28 United States

Code 1254, does confer jurisdiction upon the Supreme Court to review decisions of the United States Courts of Appeal by certiorari. The reasons for invoking this jurisdiction are, however, insufficient.

STATUTORY PROVISIONS

The statutory provisions and rules set forth in Paragraph 6 of the Petition for Writ of Certiorari are correct. In addition, however, the following is also of importance to this case:

> Rule 3. 172, Florida Rules of Criminal Procedure
>
> (a) Before accepting a plea of guilty or nolo contendere the trial judge shall satisfy himself that the plea is voluntarily entered and that there is a factual basis for it. Counsel for the prosecution and the defense shall assist the trial judge in this function.

STATEMENT OF THE CASE

Basically this suit involved the termination of the Petitioner as an employee by the Respondent newspaper. References to the Appendix of the Petitioner shall be by use of the letter "A" followed by a page citation to the Petitioner's Appendix to his Petition for Writ of Certiorari.

Petitioner was discharged by Respondent on July 25, 1979, for violating an office rule against commission of any crime. Under the rule, conviction or admission of a crime would constitute conclusive proof of the commission. (A-18).

Petitioner was a Union member and was covered by a collective bargaining agreement. The agreement by its own terms expired on March 31, 1979. (A-3). Approximately 2 months before the expiration of the collective

bargaining agreement the Respondent promulgated the rule under which Petitioner was terminated. (A-1). An earlier version of the rule had been determined to be ineffective because an employee named Thompson had been terminated under the former rule for commission of a crime, but was ordered reinstated by virtue of an arbitration ruling adverse to the Respondent. The Respondent subsequently modified the rule pursuant to a provision of the collective bargaining agreement that gave it the right to discharge employees for violation of office rules, provided the office rules did not abridge either the civil rights of the employee, or the union international charter.

In July 1979, Petitioner pled nolo contendere to the felony of receiving stolen property, and was fined $5,000.00, placed on probation for five years, and ordered to pay restitution of $500.00. (A-4). He was thereafter terminated for violating the office rule prohibiting the commission of crimes. Petitioner commenced this suit approximately two years later in July of 1981. (A-2).

The suit was originally filed in the Circuit Court of Volusia County, Florida, but was removed to the United States District Court for the Middle District of Florida. Upon motion of the Respondent, the trial court granted a summary judgment as to all counts. (A-10). Petitioner appealed to the United States Court of Appeals for the Eleventh Circuit, which affirmed the case in all respects. (A-11). A petition for rehearing en banc was subsequently denied. (A-12).

ARGUMENT

Rule 17 of the Rules of the Supreme Court of the United States notes that certiorari relief will be granted only when there are special and important reasons to do so. Thereafter, certain considerations that indicate the character of reasons that would be taken into account in determining whether or not to grant a writ of certiorari are articulated. See also, *Fay* v. *Noia*, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963). In the present case none of the specified considerations are even alleged to be present. Instead, the petitioner appears simply to want another appellate review of this fact-specific case. The United States Court of Appeals for the Eleventh Circuit has already reviewed the petitioner's position by plenary appeal, and has found no error. Yet another "appeal" is simply unwarranted.

It is submitted that no special or important reasons exist that would compel the granting of certiorari. The per curiam decision of the Court of Appeals consisted of a single paragraph and says simply that upon consideration of the record and briefs the court concluded that the district court should be affirmed. (A-11). Obviously enough, therefore, the Rule 17 criteria are not met. The decision rendered by the federal appeals court is not in conflict with another federal court, nor has it decided a federal question in a way which conflicts with a state court of last resort, nor has it departed from the accepted and usual courts of judicial proceedings, nor has it sanctioned any departure from the usual course of judicial proceedings by the lower court that would call for the exercise of the Supreme Court's supervisory power. In addition, no significant federal question is presented, and no question is decided by the appellate court in conflict with any decision of this Court.

In short, none of the reasons specified in Rule 17 that are either present in this case or are even argued to be present. As certiorari should only be granted in cases involving principles which are of importance to the public, as opposed to the parties, or where a true conflict of opinion exists, certiorari should not be granted here. *Rice* v. *Sioux City Memorial Parks Cemetary*, 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955).

The petitioner appears now to have abandoned all parts of his complaint except Count III, which he characterizes as a "straightforward breach of contract action." Petitioner's theory is that a collective bargaining agreement continued in effect until after his discharge, and the breach was a unilateral adoption of new office rules under which he was discharged. In the alternative, he asserts that he did not violate a rule concerning commission or admission of a crime, and that his discharge was discriminatory because other persons were not discharged. While it is clear that none of these issues warrant review by the Supreme Court because they are purely of personal, rather than of policy interest, each will nevertheless be responded to.

First of all, there was no evidence to the effect that the collective bargaining agreement was extended. The agreement said on its face that it expired at a date several months prior to the termination of employment. Without such an extension, there could be no "straightforward breach of contract" because there was no contract. The fact-specific nature of this matter makes it clearly inappropriate for certiorari review. Moreover, as the District Court pointed out in its Order and memorandum of Decision, the Petitioner's injury, if any, is traceable to actions of both the employer and the union (i.e., breach of duty of fair representation). (A-1, 7). Thus, it was not a straight-

forward breach of contract suit, at least in the sense that phrase is used in *International Union* v. *Hoosier Cardinal Corporation*, 383 U.S. 696, 86 S.Ct. 1107, 16 L.Ed.2d 192 (1966). Accordingly, as the district court held, the six month statute of limitations described in *DelCostello* v. *Teamsters*, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983), applies, and the claim cannot go foreward. Research has not revealed, and Petitioner has not suggested any conflicting opinions that would merit certiorari review in this regard either.

In addition, the Order and Memorandum of Decision (A-1, 4), points out that the collective bargaining agreement specifically recognized the right of the Respondent to manage its business, subject to the terms of the agreement. Assuming there was an extension of the collective bargaining agreement which covered Petitioner's termination, the agreement itself contained a rule that specifically allowed the Respondent/Employer to discharge an employee for violation of "office rules." It further provided that the office rules were not permitted to abridge the civil rights of the employee or the rights of the employee under the laws of his union. The trial court noted that by implication this section authorized the Respondent to adopt office rules not violating civil rights or rights under the international charter. Nowhere, as the Court held, did Petitioner allege or argue that the rule under which he was terminated violated either his civil rights or the union charter. Certainly no issue presented in this regard merits intervention by certiorari.

Next, Petitioner argues that even if the rule was proper and applicable, he did not violate it. The Petitioner was charged by state authorities with receiving stolen property, and pled nolo contendere to the charge. His plea was accepted, and he was fined $5,000, ordered to pay restitu-

tion of $500, and placed on probation for five years. (A-4). As a matter of law the Respondent was justified in relying on the nolo plea as the basis for termination (assuming it even had to have a base in view of the termination of the collective bargaining agreement). More importantly, however, Petitioner has failed to give any justification for requesting further review of this issue by the Supreme Court.

Moreover, under Florida law a plea of nolo contendere admits the allegations in the accusatory pleading and authorizes the imposition of a sentence. *Vinson* v. *State*, 345 So.2d 711 (Fla. 1977). See also, *Vernold* v. *State*, 376 So.2d 1166 (Fla. 1979). Indeed, before a Florida trial judge can accept a plea of nolo, he is required to satisfy himself that the plea is voluntarily entered, and that there is a factual basis for it. *Maselli* v. *State*, 446 So.2d 1079 (Fla. 1984); Florida Rules of Criminal Procedure, Rule 3.172. Thus, the Respondent was certainly warranted in relying on the plea as a basis for termination.

Finally, Petitioner urges that the subject office rule was applied to him discriminatorily because an attempt to terminate another employee under a predecessor rule was unsuccessful. The logic is faulty. The two rules were not the same. The succeeding rule was to correct problems with its predecessor. In each instance, however, the Respondent acted consistently in that it terminated the employee committing the felony. Beyond the fault in the logic, however, lies the question of why this issue of purely private importance should be the subject of certiorari. The Petitioner presents no reasons for the grant of the writ, and, it is submitted, none are present.

There was no error, as the Court of Appeals quite clearly determined. More importantly, for purposes of

this proceeding, there is no reason shown that would justify certiorari. Under the circumstances, therefore, it is submitted that the petition for writ of certiorari should be denied.

CONCLUSION

Under the circumstances it is clear that the facts presented are unique to this case and that no substantial reason for the issuance of certiorari exists. It is submitted, therefore, that the Petition for Writ of Certiorari should be denied.

Respectfully submitted this 31st day of January, 1985.

DAVID A. MONACO
COBB & COLE, P.A.
P.O. Box 191
151 Magnolia Avenue
Daytona Beach, Fl 32015